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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ERNESTO GONZALES et al., Defendants and Appellants.	H042970 (Santa Clara County Super. Ct. No. F1138356)

Defendants Juan Fonseca and Ernesto Gonzales,[1] along with several other men, came up with a plan to break into Gary Wise's house while he was away and steal valuables from his two safes. On the day of the crime, everything initially went as planned. The men, including defendants, broke into Wise's house after ensuring he had left for the evening. While inside, they discovered they were unable to move or open Wise's safes. Undeterred, the men decided to wait for Wise to return home, and when he did they ambushed him, beat him, and tortured him until he provided the combinations to his safes. After the safes were opened, the men took the items stored inside. As they left, the men stole Wise's truck, which they drove into the mountains and burned. Following a jury trial, both defendants were convicted of multiple criminal counts, including kidnapping to commit extortion, kidnapping to commit robbery, torture, assault with a deadly weapon, robbery, burglary, vehicle theft, grand theft, and arson. Defendants were each sentenced to life without the possibility of parole.

[1] Defendants are half-brothers.

On appeal, defendants argue: (1) insufficient evidence supports their convictions for kidnapping to commit extortion and kidnapping to commit robbery, (2) the statute criminalizing kidnapping to commit extortion is unconstitutionally vague, (3) their grand theft and vehicle theft convictions must be reversed, because these theft offenses are lesser included offenses of robbery, (4) the trial court's imposition of multiple punishment for several of their theft-related convictions violated Penal Code section 654,[2] (5) their penalty assessments must be reduced, and (6) remand is necessary so the trial court may exercise its discretion to determine if it should strike their firearm enhancements. As we explain in detail below, we find some of defendants' claims have merit. We reverse and remand the judgment with directions.

BACKGROUND

1. *The Information*

On May 30, 2013, an information was filed charging both defendants with: kidnapping to commit extortion (§ 209, subd. (a); count 1), kidnapping to commit robbery (§ 209, subd. (b)(1); count 2), torture (§ 206; count 3), assault with a deadly weapon (§ 245, subd. (a)(1); count 4), criminal threats (§ 422; count 5), first degree robbery (§§ 211, 213, subd. (a)(1)(A); count 6), first degree burglary (§§ 459, 460, subd. (a); count 7), grand theft from a person (§§ 484, 487, subd. (c); count 8), theft or unauthorized use of a vehicle (Veh. Code, § 10851, subd. (a); count 9), and arson (§ 451, subd. (d); count 10). It was alleged as to multiple counts that defendants personally used a firearm and personally inflicted great bodily injury. (§§ 12022.53, subd. (b), 12022.5, subd. (a), 12022.7, subd. (a).) The information charged Gonzales with an additional

[2] Unspecified statutory references are to the Penal Code.

count of first degree burglary (§§ 459, 460, subd. (a); count 11) and a count of concealing or withholding stolen property (§ 496, subd. (a); count 12).[3]

2. *The Trial*

a. **The Prosecution's Case (Counts 1 through 10, Both Defendants)**

i. *The Crime and Subsequent Investigation*

On February 6, 2011, Gary Wise lived in a rural area in Gilroy on a flag lot. His closest neighbors were about a quarter mile away. Due to the distance between their houses, Wise could not hear his neighbors talking if they were outside, but he could hear them if they raced their dirt bikes. However, when the neighborhood was quiet, he could hear his neighbors working in their garage. One of Wise's neighbors, Rose Dias,[4] testified that she could sometimes hear Wise outside yelling and cussing while she was at her house.

That day, Wise drove his truck, which had a personalized license plate that read "WISEACR," to his ex-wife's home to watch the Super Bowl. He stayed at his ex-wife's house until approximately 9 or 9:15 p.m., when he drove home. When Wise attempted to unlock his front door, he realized his screen door was locked. He had lost his key to the screen door, so he went back to his truck to retrieve a hammer and used the claw to pry open the door. He walked back to his truck to put the hammer away. He used his key to open the front door, took a step inside, and was immediately beaten by several men using bats or pool sticks. Wise believed maybe three or four men were hitting him.

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[3] In their appellate briefs, Gonzales and the People cite to an amended information that was dated June 26, 2014. The amended information is unsigned and there is no file stamp indicating it was filed with the court. We are unable to discern from the record when the amended information was filed. The substantive difference between the amended information and the information is that the information lists several other codefendants.

[4] The reporter's transcript spells Dias's name as "Diaz," but at trial Dias specifies that her last name is spelled with an "s" and not a "z."

Wise initially tried to fight back, but he was overwhelmed. The men spoke Spanish, and Wise could not understand what they were saying. Wise was unsure, but he believed his front door was closed during the attack.

After they beat him, the men zip tied Wise's feet together and lifted him onto his kitchen chair. They tied him to the chair and carried him toward the room where he kept his two safes, a black-colored safe and a champagne-colored safe. The men placed Wise in front of the two safes. They first faced Wise toward his black safe and asked him for the combination. Two of the men had guns. By that time, Wise's vision was impaired, because his right eye had been beaten shut and the men had placed a wet rag on top of his head, which obscured his sight. Wise initially refused to give the men the combination to either of his safes.

After Wise refused to give the men the safe combinations, one of the men put a gun in his mouth and told him that if he did not cooperate he would never see his son again. Wise relented and gave the men the combination to the black safe, but they were unable to open the safe even with the combination. Wise told them he would help them open the safe, so the men pushed him against it so he could reach the dial and open it. After Wise opened the safe, the men emptied its contents onto a blanket. Inside the safe, Wise had kept approximately 30 guns, $20,000 in hundred dollar bills, jewelry, coins, $40,000 in casino chips, and other items that he was saving for his son.

Subsequently, the men asked Wise for the combination to the champagne-colored safe. Wise told them that he did not have the combination, because it was his ex-wife's safe. One of the men used a pool stick and hit Wise in the groin with it multiple times. He also put needle nose pliers in Wise's nose and squeezed. Eventually, Wise relented and gave the men the combination to the champagne-colored safe. The men took everything from the champagne-colored safe and left, leaving Wise tied to the chair.

At first, Wise stayed sitting in the chair even after the men left, because he was afraid. He waited until he did not hear any movement before he attempted to stand up, still bound to the chair. It took Wise several hours, but he managed to make it into his kitchen where he was able to grab a knife and saw himself free of his restraints. Afterwards, he slowly made his way out of his house towards his neighbor Rose Dias's house. When he went outside he noticed his truck was gone. After he reached Dias's house, she called the police.

That same morning, officers arrived at Wise's house and documented his injuries.[5] Wise was able to give the officers a statement, and he told them that three men assaulted him in his home and that all three men had guns. Officers who went to Wise's house saw a big pool of what appeared to be blood just outside and to the left of his front door. They also found items such as broken pool sticks that had blood on them, what appeared to be cleaning supplies, and pieces of a broken bat. There was a dried white powdery substance on the floor near the entryway of the home. Furniture had been overturned in the house. The carpet looked like it had been stained with bleach, two safes were open, and a pool table was leaning to one side because its legs were broken. There was a strap next to a chair that looked like it had been cut with something.

At approximately 3:00 a.m. on February 7, 2011, officers were dispatched to the Saratoga mountains after they received a report of a vehicle on fire. The vehicle that was on fire was a truck that had a personalized license plate. Officers had a partial license plate number and worked backwards to get a license plate that read "WISEACR."

Officers determined a possible route between Wise's home and the area where the burned truck was found. They found a surveillance video from a bank on the route that showed a truck that matched the description of Wise's truck passed by at approximately

[5] Wise suffered lasting injuries, including reduced vision, brain trauma, and hearing loss.

2:00 a.m. that morning. On the same surveillance video, a "white GMC or Chevy" truck was seen heading in the same direction approximately two or three minutes later. Approximately 34 minutes later, the white truck returned. Later, officers observed Gonzales and his ex-wife drive a similar white truck when they surveilled Gonzales's residence.

Officers connected defendants to the crime when Sergeant Julian Quinonez, who was investigating the crime, received a call from a citizen informant. The informant gave Quinonez a cell phone number ending in 5328, which Quinonez determined was registered to someone named Joseph Griffin. For several years around 2007, Fonseca lived on Griffin's property and helped Griffin with construction work. At that time, Griffin provided Fonseca with a cell phone associated with that number. According to Griffin, Fonseca left in 2010 and took the cell phone with him. Calls were made between the number associated with Griffin ending in 5328 and numbers registered to Norberto Serna, Isaias Serna, and Juvenal Reyes around the time the robbery occurred. Cell phone activity showed the calls were made somewhere near the vicinity of Wise's home. The number associated with Griffin also connected to a cell phone tower near the Saratoga mountains, where Wise's burned truck was later found, in the hours after the robbery. Sometime in March 2011, Griffin canceled the phone number.

ii. *Isaias Serna's Testimony*

In February 2011, Isaias Serna was 17 years old. Isaias and his father, Norberto Serna, had previously done some work for Juvenal Reyes.[6] Reyes was one of Wise's neighbors. Isaias knew Fonseca and Gonzales through his father.

Sometime in 2010, Isaias became aware of plans to burglarize a house in Gilroy. Isaias, Norberto, Fonseca, Gonzales, and Reyes all met to discuss the burglary.

[6] We refer to Isaias and Norberto by their first names for clarity.

Reyes had told the other men that Wise had a lot of money. As part of the plan, Isaias was tasked with watching Wise to see when he would leave his house. When they met to discuss the burglary, Isaias did not see any of the men were armed with guns. Later, Fonseca and Gonzales brought four guns over to the house that Isaias lived in with his father, Norberto.

On February 6, 2011, Gonzales called Isaias and told him to meet Gonzales in Gilroy so Isaias could watch Wise's truck and call Gonzales when Wise left. Isaias did as Gonzales asked and watched Wise's truck for several hours. When Wise left, he called Gonzales. Isaias went home afterwards. He did not see Norberto until the next day. Isaias expected to receive money from Gonzales but never did.

Isaias had previously testified at another trial about the same events and had said he did not remember meeting the men to discuss the burglary. He admitted he partially blamed Gonzales for his father's arrest and subsequent conviction for the crimes committed against Wise.

On May 3, 2011, Isaias spoke with Herman Leon, a sergeant with the Santa Clara County Sheriff's Office. Initially, Isaias denied involvement in the robbery. Eventually, Isaias admitted his role in the crime. He told Leon that the men had planned the robbery approximately a week before the crime took place. The plan was to wait until dark and burglarize the home when Wise was away. Isaias was supposed to surveil Wise to help facilitate the burglary. Isaias received a phone call from Gonzales on February 6, 2011, and he met Gonzales in Gilroy where he subsequently waited and watched Wise's truck. When Wise left for the evening, Isaias followed Wise until he was sure Wise was returning home, providing updates to Gonzales. Isaias told Deputy Leon that he and his father never received money for their role in the crime.

iii. *Danny Rivera's Testimony*

In 2012, Danny Rivera pleaded guilty to possession of stolen property in connection with Wise's robbery. Rivera knew Gonzales's half-brother, Juan Navarro. According to Rivera, Gonzales had contacted him and had asked him for help selling items. Rivera said he agreed to help Gonzales in exchange for a portion of the sale proceeds. Thereafter, Gonzales brought Rivera various items to sell, including coins, street gear, motorcycle gear, boots, computer equipment, casino chips, silver, and gold. Sometimes Fonseca would come with Gonzales when Gonzales brought items to Rivera. Rivera mostly sold the items on eBay. He did not know the items were stolen, and he thought the items belonged to either Gonzales or Fonseca. Gonzales had previously asked Rivera about selling guns, but Rivera had told him that he did not want to be involved with those types of sales.

iv. *Juan Navarro's Testimony*

Sometime before the robbery, Gonzales asked Navarro if he wanted to "come up on some money and pretty much do something." Several weeks later, Gonzales told Navarro he planned to break into someone's house. Gonzales explained that he had been watching the house he wanted to break into and was in the process of formulating a plan. Gonzales estimated the house had $2 million worth of valuables.

After the robbery occurred, Gonzales told Navarro he had completed his plan to break into the house. Gonzales said he had "invaded" the man's house and had taken everything. Gonzales explained that he and his accomplices had watched the man for a while, went inside the man's house, then waited for the man to come home. Gonzales said there were several safes, but he and his accomplices could not open them and the safes were too big to haul out. Gonzales and his accomplices waited inside the man's house until he came home and beat him until he opened the safes for them. Gonzales told Navarro he beat the man with a bat. Gonzales also said the beating took "awhile," and

the men took jewelry, money, silver, and guns. Gonzales further said they took the man's car and burned it.

Gonzales told Navarro that he had given some of the stolen items to Navarro's friend, Danny Rivera, for Rivera to sell. Gonzales then showed Navarro some photos, taken after the robbery, of him and Fonseca with guns.

Prior to testifying at defendant's trial, Navarro received a threatening phone call telling him not to testify in court. The phone call started with a recording that stated the call was originating from a correctional facility in Santa Clara County. The caller did not provide a name. After that call, Navarro received a text message and several other phone calls from private numbers telling him not to testify. Navarro responded to one of the text messages, and the recipient responded that they were "[Gonzales's] cellmate's homie" and that Navarro was "getting a message from [Gonzales]."

v. *Correctional Deputy Veronica Flores's Testimony*

Correctional Deputy Veronica Flores testified that on June 11, 2015, someone used Fonseca's inmate number to call a number ending in 9669. Navarro testified that the number ending in 9669 was his phone number at the time he received the threatening phone call.

vi. *Araceli Gonzalez's Testimony*

Gonzales was separated from his ex-wife, Araceli Gonzalez, at the time of the robbery.[7] Gonzales's abuse of Araceli prompted the separation. At some point, the couple reconciled after the robbery, toward the end of February 2011. After the reconciliation, both Gonzales and Fonseca lived with Araceli in an apartment. Araceli's apartment had a garage, but defendants did not permit her to go inside of it. Araceli testified at defendants' trial on behalf of the prosecution after she was granted immunity.

[7] We refer to Araceli by her first name for clarity.

According to Araceli, defendants asked her to help them sell some old casino chips. She was never told where the chips came from. Sometime in March or April of that year, Araceli overheard a conversation between Gonzales and someone else over the phone. Araceli could hear the person over the phone yelling, "I want my stuff." From the tone of the person's voice, Araceli believed Gonzales was speaking to Norberto. After the call, Araceli checked Gonzales's phone log, which confirmed that the number Gonzales's phone had dialed was Norberto's number.

In May 2011, Araceli planned on moving out of her apartment and began cleaning it in preparation. While vacuuming, she moved a table and noticed there were screws in the carpet. She thought that was odd, so she contacted Sergeant Quinonez. After a search, rifles and coins were found in a compartment underneath the carpet.[8]

b. **The Prosecution's Case (Counts 11 and 12, Gonzales Only)**

On January 13, 2011, Chiahwong Huang lived in a house in Sunnyvale, California, with his wife and two children. That morning, Huang left to go to work. He was the last person to leave the house in the morning. While he was at work, Huang received a call from his son, who told him that someone had broken into their house. Huang returned home and discovered that his collection of old guns, cash, two laptops, and an iPod were missing. At the time, Huang kept his guns locked in a gun safe in his study. The key for the gun safe was kept in a metal box with other keys. Huang noticed the glass panel to his garage was broken and the side door and gate were open.

Huang had hired Gonzales twice in 2010 to make repairs to his house. Gonzales had changed doors and windows, including the door and windows in the study where he kept the gun safe.

[8] Wise later identified the items found in the floorboard compartment as belonging to him.

Cell phone activity for the phone number ending in 5328 indicated that number made calls near the Sunnyvale area, encompassing Huang's home, the morning of the burglary.

c. **Gonzales's Defense**

Gonzales testified on his own behalf. He denied kidnapping, torturing, or assaulting Wise. He asserted he had never been inside Wise's home. He acknowledged he knew Huang, because he had done some work for him inside his home as a general contractor. However, he denied burglarizing Huang's house.

Gonzales said he met Norberto while incarcerated for a misdemeanor. While in jail, he and Norberto chatted about how they both enjoyed drinking "hot milk," a drink made from fresh cow's milk. After they were released from jail, Norberto invited him to a ranch to drink hot milk. At the ranch, owned by Reyes, Norberto told Gonzales that Reyes wanted to remodel a room. Norberto introduced Gonzales to Reyes. Gonzales received some preliminary information about the remodeling work and provided Reyes with an estimate. Reyes told Gonzales he thought the quote was too expensive.

After Gonzales gave Reyes the estimate, Reyes asked him questions about his work truck, including how many pounds it could haul and if he had previously used it for heavy loads. Norberto asked him similar questions about his truck. Reyes and Norberto told Gonzales that they had a job moving a load of items, but they would not tell him the specifics about what the job entailed. The men told Gonzales that they would pay him $5,000 if he loaned them his truck. Gonzales asked them what kind of items he would be moving, because he thought that was a lot of money for such an "easy" job. Norberto and Reyes told Gonzales the job was his if he did not ask questions, and he would just have to bring his truck over to Reyes's ranch. At the time, Gonzales thought the men wanted to use his truck to haul drugs. Norberto and Reyes also told Gonzales they would

need him to help store some items in his garage. Gonzales told them he used his garage to store his construction equipment, so storing items in his garage would not be possible.

Thereafter, Norberto and Reyes asked Gonzales if he knew anyone who could sell them firearms. At the time, Gonzales had some guns that he had purchased from one of his workers. The worker he purchased the guns from had helped him with the work he completed on Huang's house in Sunnyvale. Gonzales ended up selling two guns to Norberto.

Gonzales showed up at Reyes's ranch as planned on the day of the job. He brought Fonseca with him. When Gonzales and Fonseca arrived, Norberto was present. Gonzales did not go inside Reyes's house. He waited outside for several hours. Later, Norberto's son, Isaias, arrived. After Isaias arrived, Norberto took the keys to Gonzales's truck and drove off with it. Gonzales waited at Reyes's ranch until Norberto came back with his truck. The truck was empty, and Norberto told Gonzales they could not load the truck. Norberto told Gonzales not to get anxious, and they were going to try to load the truck again. At that time, Gonzales still did not know what they were using his truck for.

Norberto left and returned with the truck fully loaded with items. Norberto also came back with a bronze-colored truck that Gonzales had never seen before. At that point, Norberto asked Gonzales if he could store the items at his house because Reyes did not want his wife to see the items and Norberto lived in an RV and did not have enough storage space. Norberto told him that when he received the items back from Gonzales he would pay Gonzales for the job. Gonzales agreed to store the items for a day or two. Gonzales and Fonseca drove the two trucks back to Gonzales's apartment. Gonzales drove the bronze truck and left it somewhere in the mountains. He did not burn the truck, and he did not know how it got burned. After he returned home, Gonzales's brother, Fonseca, helped him unload the items into his garage. While unloading, he saw that the items included weapons and memorabilia. He suspected the items may have been stolen.

However, he did not know where the items were stolen from because he had not accompanied Norberto or Isaias.

That night, Norberto stayed at Gonzales's apartment. The next day, Gonzales took Norberto back home. There, Norberto spoke to his son in a low tone. Based on their conversation, Gonzales learned that the items had been stolen from someone's home. Gonzales also overheard Norberto and Reyes arguing about the situation.

Initially, Norberto told Gonzales that he would come and pick up the items the next day with Gonzales's $5,000 payment. Norberto, however, did not pay Gonzales or return to pick up the items. Instead, he repeatedly called Fonseca and asked him to tell Gonzales to move the items back to Reyes's ranch. In response, Gonzales asked for his payment. Gonzales became impatient when Norberto and Reyes failed to pay him, so he began selling some of the items he stored in his garage without telling them. He made a deal with Rivera to help him sell some items. He also asked his ex-wife, Araceli, to help sell items. Gonzales admitted that he frequently hit Araceli when they were together.

Gonzales denied telling his brother, Navarro, about how he had planned to rob Wise. He also denied asking Navarro if he wanted to participate in the crime. He believed Navarro was lying because he was jealous that their father preferred him.

Gonzales admitted that Fonseca helped him construct the hidden compartment in his apartment where some of the stolen items were found. He did not tell Araceli about the items he was holding, because he believed she might call the police.

3. *The Verdict and Sentencing*

On June 24, 2015, the jury reached a verdict, finding both defendants guilty of all charges. On October 19, 2015, the trial court sentenced Fonseca to life without the possibility of parole plus 15 years, four months and Gonzales to life without the possibility of parole plus 17 years, four months. Fonseca's sentence was composed of a term of life without the possibility for parole for his conviction for kidnapping to commit

extortion, a 10-year enhancement for personal use of a firearm, a consecutive midterm of four years for first degree burglary, and consecutive terms of eight months (one-third of the midterm) each for vehicle theft and arson. The remaining sentences for Fonseca's other convictions were stayed under section 654. Gonzales's sentence was composed of a term of life without the possibility of parole for his conviction for kidnapping to commit extortion, a 10-year enhancement for personal use of a firearm, a consecutive midterm of four years for first degree burglary, and consecutive terms of eight months (one-third of the midterm) each for vehicle theft and arson. For the two counts related to the burglary of Huang's home, Gonzales was sentenced to 16 months for residential burglary and a consecutive term of eight months for withholding or concealing stolen property. The remaining sentences for Gonzales's other convictions were stayed under section 654.

DISCUSSION[9]

1. *Kidnapping to Commit Extortion*

Both defendants challenge their convictions for kidnapping to commit extortion (§ 209, subd. (a)), which provides in pertinent part that "[a]ny person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away another person by any means whatsoever with intent to hold or detain, or who holds or detains, that person for ransom, reward or to commit extortion or to extract from another person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony . . . ." At the time defendants committed their offenses, section 518 defined extortion as "the obtaining of property from another, with his consent, or the obtaining of

[9] Defendants filed separate appellate briefs but joined in each other's arguments to the extent they were relevant.

an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right." (Former § 518.)[10]

At trial, the prosecution's theory of guilt was that the men induced Wise's consent to hand over the combination to his safes, which constituted property under the law. Defendants argue there is insufficient evidence Wise *consented* to the taking of any property and the combination to the safes the men obtained cannot constitute "property" for the purposes of the extortion statute.

a. **Standard of Review**

"In reviewing a challenge to the sufficiency of the evidence, we 'review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.' " (*People v. Sandoval* (2015) 62 Cal.4th 394, 423, italics omitted.)

b. **Consent**

Defendants claim there is insufficient evidence Wise consented to the taking of his property. Defendants claim the men never intended to induce Wise's consent, and the facts presented at trial demonstrate only that the men intended to commit a robbery by forcibly taking the items from Wise's safes. As we explain in detail below, we disagree.

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[10] Section 518 was amended in 2017, and it now reads in part: "(a) Extortion is the obtaining of property or other consideration from another, with his or her consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right. [¶] (b) For purposes of this chapter, 'consideration' means anything of value . . . ." (Stats. 2017, ch. 518, § 1, eff. Jan. 1, 2018.)

"[T]he crime of extortion is related to the offense of robbery; indeed, courts have sometimes found it difficult to distinguish these two offenses. [Citations.] The statutory definitions of robbery and extortion are structurally similar. [Citation.] Both offenses have their roots in common law larceny and both share a common element—acquisition by means of force or fear. [Citation.] The two crimes are distinguishable—in an extortion, the property is taken with the victim's consent, while in a robbery, the property is taken against the victim's will." (*People v. Kozlowski* (2002) 96 Cal.App.4th 853, 866 (*Kozlowski*).) Robbery requires "a specific intent to permanently deprive the victim of the property" and also "requires the property be taken from the victim's 'person or immediate presence.' " (*People v. Torres* (1995) 33 Cal.App.4th 37, 50 (*Torres*); § 211.) Extortion, on the other hand, "require[s] the specific intent of inducing the victim to consent to part with his or her property." (*Torres, supra,* at p. 50.) The consent may be induced by the wrongful use of force or fear. (Former § 518.)

Defendants argue that Wise never made a deal with any of them, and he did not hand over his property with "apparent willingness," in other words, with consent. (*People v. Peck* (1919) 43 Cal.App. 638, 645 (*Peck*) [sufficient evidence of extortion when victim made deal with defendant].) Defendants insist that their actions made clear that their intent was to take Wise's property against his will, and they were not going to take "no" for an answer.

Defendants argue that *People v. Anderson* (1922) 59 Cal.App. 408, 426 (*Anderson*) lends clarity to the distinction between a robbery and extortion. In *Anderson*, the defendants demanded that the victim assign a certificate of registration and a bill of sale and write a check in the amount of $95. (*Ibid*.) On appeal, the court held that there was no evidence in the record that the property was "obtained 'under color of official right' " or that the property was taken with the victim's consent (*Id*. at p. 426.) In other words, the *Anderson* court believed the "consent" element of extortion was not satisfied

based on the evidence presented. Defendants argue that their actions were analogous to the actions taken by the defendants in *Anderson*; thus, there is insufficient evidence that Wise consented to the taking of his property.

We find defendants' reliance on *Anderson* to be misplaced. The issue in *Anderson* was not whether there was insufficient evidence to support the defendants' convictions for extortion. Rather, the *Anderson* court was concerned with a similar, but different issue—whether the evidence supported a conviction of *extortion* and not the charged crime of *robbery*. (*Anderson*, *supra*, 59 Cal.App. at p. 411.) Cases are not authority for propositions not considered, and *Anderson* did not consider the same issue contemplated by defendants here. (*People v. Avila* (2006) 38 Cal.4th 491, 566.)

Furthermore, we respectfully disagree with *Anderson* to the extent it construes the crime of extortion as requiring *willing* consent, in contrast to *unwilling* consent. Former section 518 expressly defines "extortion" as obtaining property with consent "*induced by wrongful use of force or fear*, or under color of official right." (Former § 518.) Thus, "[t]he victim of an extortioner might openly consent to the taking of his money 'and yet protest in his own heart' against its being taken." (*People v. Goldstein* (1948) 84 Cal.App.2d 581, 586.) In other words, defendants may have induced Wise's consent through use of force or fear, resulting in an *unwilling* consent. However, Wise's unwillingness does not as a matter of law negate the existence of the men's intent to induce Wise's consent or the consent itself. As defendants themselves observe and as described in *Peck*, a coerced consent occurs when one hands over property with "*apparent* willingness." (*Peck*, *supra*, 43 Cal.App. at p. 645, italics added.) A victim may still consent even if he or she does not truly *desire* to part with their property.

Defendants also rely on *Torres*, *supra*, 33 Cal.App.4th 37 and its interpretation of what constitutes a robbery. In *Torres*, the defendant was a " 'rent' " collector for a gang in Los Angeles. (*Id*. at p. 42.) One night, the defendant committed two crimes: he shot

and killed a drug dealer that he was trying to collect money from and attempted to obtain money at gunpoint from a passerby. (*Ibid*.) During the defendant's trial, a police officer testifying as the prosecution's expert witness was asked if " 'collecting of rent' " is extortion and if he could describe what he believed constituted the crime of " 'extortion.' " (*Id*. at p. 44.) On appeal, the defendant in part argued his counsel rendered ineffective assistance by failing to object to this portion of the officer's testimony. (*Id*. at pp. 48-49.)

When analyzing the defendant's ineffective assistance of counsel claim, the *Torres* court recounted the factual circumstances of the defendant's crimes. When the passerby walked by, the defendant pointed a gun at him, ordered him against the wall, and asked him for money. (*Torres*, *supra*, 33 Cal.App.4th at p. 51.) When the drug dealer walked by, the defendant grabbed him, put a gun to his head, and told him to give him the money or he would "put [his] brains out." (*Ibid*.) The drug dealer told the defendant to go ahead, and the defendant shot him point-blank in the head. (*Ibid*.)

The *Torres* court determined that the evidence at trial showed the defendant committed attempted robbery of both victims. (*Torres*, *supra*, 33 Cal.App.4th at p. 52.) With respect to the crime committed against the passerby, the court noted that the evidence showed the defendant did not have the specific intent to obtain the passerby's money through consent, which is a necessary element of extortion. (*Ibid*.) With respect to the drug dealer, the court determined that by training his gun on the victim, the defendant demonstrated an intent to take his money through force against his will rather than with his consent induced by fear. (*Ibid*.) Ultimately, the *Torres* court concluded that a jury could not have reasonably reached any other conclusion other than that the defendant's acts constituted attempted robbery. (*Ibid*.) Thus, the court held that any error in permitting the officer's testimony was harmless. (*Ibid*.)

Torres, however, is distinguishable. Unlike the factual scenario contemplated in *Torres*, there is evidence in this case from which a jury could conclude that defendants had the specific intent necessary to commit extortion. Here, the combinations to the two safes were intangible items. Defendants could not physically take the combinations to the safes from Wise against his will, as required for a robbery. Wise needed to voluntarily part with the combinations. Moreover, the evidence presented was that the men beat, tortured, and threatened Wise to get him to surrender the combination of the safes. Thus, the jury could reasonably infer from the evidence that defendants acted with the intent to force Wise to consent—albeit unwillingly, through the use of fear.

Defendants also argue that Justice Kaus's statements in his concurring opinion in *People v. Norris* (1985) 40 Cal.3d 51, 57 (conc. opn. of Kaus, J.) supports their claim. In *Norris*, Justice Kaus opined that "[t]he statutory scheme makes it clear that the Legislature intended to reserve the more drastic penalty of subdivision (a) [of section 209] for cases involving the typical kidnaping for ransom scenario, where the kidnaping victim is held for some period of time to extort some collateral act. [Citation.] Subdivision (a) was not intended to apply to cases which fit the typical robbery mold, where the victim is required, by force or fear, to immediately part with a wallet, a car or some other property." (*Id*. at p. 58.)

Citing Justice Kaus's assertion in *Norris*, defendants insist that the immediacy of the threatened consequences to Wise made the crime a robbery, not an extortion. (See also *Torres*, *supra*, 33 Cal.App.4th at p. 52, fn. 7 ["A distinction traditionally drawn between robbery and extortion is that a person commits robbery when he threatens immediate harm to the victim whereas he commits extortion when he threatens future harm to the victim."].) Notwithstanding Justice Kaus's statement in *Norris*, we have

found nothing in former section 518 that sets forth an additional requirement that an extortion victim's consent must be induced by the wrongful use of *future* force or fear.[11]

Additionally, even if we construe the crime as requiring a threat of *future* harm, that requirement has been satisfied. While attempting to obtain the safe combinations from Wise, defendants threatened him and told him that if he did not comply with their demands he would never see his son again. A jury could reasonably interpret this statement as a threat of *future* harm to either Wise or his son. Defendants argue this is an unreasonable interpretation of the threat, because it was made after one of the men placed a gun in Wise's mouth. But the jury could have believed the statement was a threat to Wise's son and not a threat to immediately kill Wise, since defendants needed Wise's cooperation to open the safes.

Defendants warn that finding sufficient evidence to support their convictions for kidnapping to commit extortion would essentially elevate "any home invasion robbery, and perhaps any robbery, where the victim turns over property under the threat of potential immediate physical harm, into kidnapping to commit extortion." We disagree with this sentiment. Although the two crimes are related, they retain clear differences. To find a defendant guilty of extortion, there must be sufficient evidence of a "specific intent [to] induc[e] the victim to consent to part with his or her property." (*Torres, supra*, 33 Cal.App.4th at p. 50.) Moreover, robbery requires the proof of elements not required to prove extortion: "a specific intent to permanently deprive the victim of the property"

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[11] In his reply brief, Fonseca argues the historical underpinnings of the initial Penal Code enacted in 1872 support the principle that threat of *immediate* harm does not constitute an extortion. However, Fonseca's citations do not support his position. Rather, they merely reiterate that extortion and robbery are *different* offenses, with robbery requiring a taking by force or fear while extortion requires a taking with consent *induced* by threats. We fail to see how this distinction requires an additional element that extortion requires a taking with consent induced by threats of *future* harm.

and that "the property be taken from the victim's 'person or immediate presence.' " (*Ibid*.; § 211.) The hypotheticals advanced by defendants in their briefs may or may not satisfy the elements of extortion. Such a determination would have to be made by a trier of fact following an examination of the evidence presented in each specific case, and our conclusion that *defendants*' convictions here are supported by sufficient evidence would not be determinative of that analysis.

Based on the foregoing, we find no merit in defendants' claims that there is insufficient evidence they intended to induce Wise's consent through force or fear.

c. Property

Next, defendants argue that their convictions are unsupported by sufficient evidence, because safe combinations cannot constitute property under former section 518.

Defendants acknowledge that a similar argument was considered and rejected in *Kozlowski*, *supra*, 96 Cal.App.4th 853. In *Kozlowski*, the defendants obtained personal identification numbers (PIN codes) from their victims. On appeal, the defendants argued the PIN codes were not property that could be extorted. (*Id*. at p. 864.) The *Kozlowski* court rejected this argument, noting that section 7, subdivision (10) provides that "property" includes "both real and personal property." "Personal property" includes "money, goods, chattels, things in action, and evidences of debt." (§ 7, subd. (12).) However, "[b]y its terms, subdivision 12 of section 7 does not create an exclusive list of personal property limited to those specifically named." (*Kozlowski, supra,* at p. 865.) Thus, the *Kozlowski* court determined that "property" also includes intangible items. (*Id*. at pp. 867-868.)

Construing the term "property" for the purposes of extortion, the *Kozlowski* court considered cases involving multiple theft offenses including robbery, larceny, and extortion. (*Kozlowski, supra,* 96 Cal.App.4th at p. 866.) It concluded that for theft-based offenses, courts have construed "property" as "the exclusive right to use or possess a

thing or the exclusive ownership of a thing." (*Ibid*.) "Thus, it may reasonably be said that a PIN code is property because it implies the right to use that access code—and to access the funds in the related bank account by means of that code. [Citation.] Operating as it does as a means of account access, a PIN code can be characterized as intangible property." (*Id*. at p. 867.) In sum, the *Kozlowski* court held that the PIN codes obtained by the defendants constituted property for the purposes of the crime of kidnapping for extortion. (*Id*. at p. 869.)

Defendants urge us not to adopt the reasoning set forth in *Kozlowski*. They argue that if we did, we would be overstepping our authority by expanding the definition of property to include something contrary to the explicit definition found in the Penal Code. We reject defendants' arguments and find *Kozlowski* to be persuasive, particularly its interpretation of section 7, which defines certain words and phrases used in the Penal Code. As stated in *Kozlowski*, section 7, subdivision (10) states that "[t]he word 'property' includes both real and personal property." In turn, section 7, subdivision (12) expressly states that "[t]he words 'personal property' *include* money, goods, chattels, things in action, and evidences of debt." (Italics added.) Based on the wording of the statute—particularly the use of the word "include"—we agree with *Kozlowski*'s determination that the language of section 7, subdivision (12) supports the interpretation that the list is *not* meant to be wholly exhaustive of *all* items that can constitute personal property.

In an effort to undermine *Kozlowski*, defendants argue that *People v. Kwok* (1998) 63 Cal.App.4th 1236, upon which *Kozlowski* relied, is not well-reasoned. In *Kwok*, the appellate court determined that temporarily taking a lock to make a copy of a key constituted theft. In reaching this conclusion, the *Kwok* court noted that Civil Code section 654 states that " '[t]he ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may

be ownership is called property.' " (*Kwok*, *supra*, at p. 1250.) Thus, the *Kwok* court reasoned that "property is something that one has the exclusive right to possess and use," rendering a key to someone's house is "property." (*Id.* at pp. 1250-1251.)

Defendants argue *Kwok*'s reasoning is erroneous, because Civil Code section 654's definition is limited to the Civil Code and *is not* applicable to provisions in the Penal Code. We agree in principle that Civil Code section 654's application is limited to the Civil Code. However, we disagree with defendants' claim that *Kwok*'s citation to Civil Code section 654 undermines its analysis. Rather, we find the fact that the Civil Code's definition of "property" is consistent with our (and *Kozlowski*'s) interpretation of the Penal Code provision to be persuasive, bolstering our conclusion.[12] *Kwok*'s expansive definition of the term "property" is consistent with other cases that have also routinely held that "property" is defined broadly, even describing it as " ' "all-embracing so as to include every intangible benefit and prerogative susceptible of possession or disposition" ' " or " ' "any valuable right or interest protected by law." ' " (*Downing v. Municipal Court* (1948) 88 Cal.App.2d 345, 350.)

Defendants maintain that nothing in the history or language of former section 518, which defines extortion, suggests that the Legislature intended the word "property" to have a meaning other than what is expressly stated in section 7. They argue that *Kozlowski* ignored the part of section 7 that states that the definitions set forth in that section apply "unless otherwise apparent from the context" of a particular statute. They also argue the history of section 518 reflects the Legislature did not intend to expand the

[12] Other definitions, including the definition set forth in Black's Law Dictionary, also comport with our conclusion. There, "personal property" is defined as "[a]ny movable or intangible thing that is subject to ownership and not classified as real property." (Black's Law Dict. (10th ed. 2014) at p. 1412.)

definition of "property" or "personal property" beyond the definitions set forth in section 7.

In support of their claims, defendants cite to *People v. Robinson* (1933) 130 Cal.App. 664. There, the defendant was charged with extortion after he allegedly threatened a judge with public disgrace unless the judge appointed him to a receivership. At that time, section 518 defined extortion as " 'obtaining of property from another.' " (*Robinson, supra*, at p. 666, italics omitted.) The *Robinson* court noted it was well-established that a public office, quasi-official or otherwise, is not property and reversed the defendant's conviction for that offense. (*Id*. at pp. 666, 668.) In 1939, in response to *Robinson*, the Legislature amended section 518 and added language that expanded extortion to include "the obtaining of an official act of a public officer." (*Isaac v. Superior Court* (1978) 79 Cal.App.3d 260, 263.)

Defendants' view is that by amending former section 518 following *Robinson*, the Legislature demonstrated an intent to expand the definition of extortion, but it did *not* demonstrate an intent to expand the definition of "property" to include intangible property that was not already specified in section 7. We disagree. The Legislature's post-*Robinson* amendment of former section 518 was meant to address a specific action that fell *outside* the purview of former section 518's definition of "extortion." The determination that intangible property is still property within the meaning of section 7, subdivision (12), is unrelated. Rather than expand the definition of "extortion" or "property," our conclusion is that section 7, subdivision (12)'s definition of "personal property" *never excluded* intangible items, and the various items listed in the statute are merely a non-exhaustive list of items that *may* constitute personal property.[13] In other

[13] For the same reasons, we reject defendants' claim that the fact that the Legislature included two intangible items in its list of items constituting "personal property" (namely, "things in action" and "evidences of debt") (see § 7, subd. (12)) (continued)

words, we are not expanding the scope of the definition of "personal property" as set forth under section 7, subdivision (12).

Moreover, we believe our view is one that is shared by the California Supreme Court, which cited to *Kozlowski* with approval in *People v. Romanowski* (2017) 2 Cal.5th 903. In *Romanowski*, the court contemplated whether Proposition 47, which reduced punishment for crimes, including crimes where a defendant obtained any property by theft where the value of the stolen item is less than $950, applied to the crime of theft of access card account information. (*Romanowski*, *supra*, at p. 906.) In a footnote, the *Romanowski* court noted that the People were not arguing that access card information fell outside the purview of section 490.2's reference to " 'property.' " (*Romanowski*, *supra*, at p. 911, fn. 3.) Citing *Kozlowski*, the *Romanowski* court asserted that the People would be unable to make that argument, because "[a]ccess card information is a form of intangible property, just like PIN numbers and trade secrets." (*Ibid.*)

Defendants acknowledge the *Romanowski* court's apparent approval of *Kozlowski* but argue it is merely dicta, because it had no bearing on the issues actually decided by the court. Defendants also insist that we should disregard *Romanowski*'s statement, because it was an offhand remark that was not made following a " 'thorough analysis of the issue.' " (*People v. Smith* (2002) 95 Cal.App.4th 283, 300.) We agree that the perfunctory nature of the footnote minimizes the persuasive weight of *Romanowski*'s statement. Nonetheless, we adhere to our view, which appears to be shared by the *Romanowski* court, that intangible items are personal property within the meaning of section 7, subdivision (12) and are thus properly considered as property within the meaning of former section 518.

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indicates an intent to exclude other intangible items such as combinations to safes or locks, which defendants argue existed in the Roman times.

Lastly, we reject defendants' assertion that the Legislature's enactment of statutes specifically prohibiting theft or fraudulent use of certain intangible items, such as section 484e (fraudulent use of access cards and access card information), section 498 (theft of utility services), and section 499c (theft of trade secrets), somehow indicates that the term "property" as used in the context of theft-related crimes was meant to exclude intangible items. We agree with the general principle that in certain situations legislative intent can be inferred from the Legislature's omission of language. (See *In re Ethan C.* (2012) 54 Cal.4th 610, 638 ["When language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful."].) Nonetheless, there are multiple reasons why the Legislature may have decided to pass these specific statutes. The Legislature may have wanted to clarify definitions or create more nuanced punishments for certain types of property. Defendants, however, do not cite to or analyze any of the legislative history of the statutes they cite, rendering their position that these statutes signal a legislative intent that other types of intangibles should not be considered "property" largely speculative.

We therefore find there is sufficient evidence that defendants induced Wise with force and fear to consent to give over property—namely, the combination to Wise's safes.

d. **Conclusion**

Based on the foregoing, we find there is sufficient evidence from which the jury could infer defendants extorted property from Wise. Defendants' claims of insufficient evidence therefore fail.

2. *Constitutionality of the Extortion Statute*

Both defendants argue that if we find sufficient evidence supports their convictions for kidnapping to commit extortion, the extortion statute is unconstitutionally vague and deprives them of due process of law under the Fourteenth Amendment.

Defendants insist that "consent" as used in the extortion context has no clear definition, and a "coerced consent" is no different than unwillingness—in other words, coerced consent is not consent at all.

Preliminarily, the People argue defendants have forfeited their arguments for failing to raise them below. We disagree. Although both defendants use language in their briefs that indicate they are launching an "as-applied" challenge to the constitutionality of the law, the *substance* of their arguments is that the statute is facially vague because there is no distinction between coerced consent and unwillingness; thus, no difference between extortion and robbery. Furthermore, to the extent defendants' claims are based on undisputed facts or are pure questions of law, we exercise our discretion to consider it. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 880-881, 887-888.)

Underpinning a vagueness challenge to a statute is the due process requirement of adequate notice. " 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' " (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115 (*Acuna*).) Thus, " 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' " (*Ibid.*)

Another concern for the vagueness doctrine is the requirement that the Legislature provide adequate guidance to law enforcement. (*Acuna*, *supra*, 14 Cal.4th at p. 1116.) "Thus, a law that is 'void for vagueness' not only fails to provide adequate notice to those who must observe its strictures, but also 'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.' " (*Ibid.*)

Furthermore, the " 'prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater

precision.' " (*People v. Superior Court* (*Hartway*) (1977) 19 Cal.3d 338, 345.) "In most English words and phrases there lurk uncertainties." (*Robinson v. United States* (1945) 324 U.S. 282, 286.) " 'Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty that some statutes may compel or forbid. All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden.' " (*Hartway*, *supra*, at p. 345.)

In applying these principles, we reject defendants' claim that former section 518, which defines extortion, is unconstitutionally vague. "Consent" as used in former section 518 does not have a precise definition but precise definitions are rare in the context of language. Black's Law Dictionary defines "consent" as "[a] voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose, esp. given voluntarily by a competent legal person; legally effective assent." (Black's Law Dict. (10th ed. 2014) at p. 368.) Similarly, the Oxford English Dictionary defines "consent" as "voluntary agreement to or acquiescence in what another proposes or desires; compliance, concurrence, permission." (Oxford English Dict. Online (2019) <http://oed.com/consent> def. 1 [as of Feb. 5, 2019] archived at <https://perma.cc/4WKB-7VPF>.)

We believe this commonly understood meaning of "consent" is what should be used when interpreting former section 518. Defendants' arguments to the contrary do not convince us otherwise. For example, the language in *Peck*, *supra*, 43 Cal.App. 638, that explains that property is obtained with consent under the extortion statute if the victim gives it to the extortioner with "apparent willingness," comports with the common definition of the word "consent." (*Id*. at p. 645.) In our view, "willingness" and "voluntary yielding" or "voluntary agreement or acquiescence" have essentially the same meaning. *Peck*'s use of the phrase "apparent willingness" instead of just "willingness"

stems from the fact that in the extortion context consent is *induced* by force or fear. As we have previously stated, an extortion victim may not *want* to consent, but he or she nonetheless consents, an action that is willing or voluntary. Consent is not negated if it is obtained from an extortion victim who, unwillingly after inducement by force and fear, voluntarily provides the perpetrator with property.

Moreover, defendants' assertion that finding the statute constitutional would render any robbery an extortion, an argument similar to the one they previously made to support their claim of insufficient evidence, is misleading. As we stated in the preceding section of the opinion, determining whether the hypothetical scenarios advanced by defendants (such as a perpetrator demanding that a cashier hand over money) constitute extortions or robberies would require *factual determinations* by a trier of fact. We can imagine that in some cases, there would be insufficient evidence of consent as required under former section 518. In other cases, evidence of consent may be borderline sufficient, with some facts supporting a contrary finding. However, these factual scenarios are not before us, and when determining the *facial* validity of the statute, a statute is vague only if it is " 'impermissibly vague in *all of its applications*.' " (*Acuna*, *supra*, 14 Cal.4th at p. 1116.) As stated, we do not believe that is the case. Nor is it the case that the statute is vague as applied to defendants. Here, defendants threatened and beat Wise to get him to divulge the combination to his safes. There is sufficient evidence that showed that when Wise gave defendants the safe combinations, Wise *voluntarily* did so. It would not require guesswork for defendants to conclude they committed an extortion as defined under former section 518.

Furthermore, the fact that a prosecutor may have the discretion to choose what charges to pursue in certain cases where the evidence may support either a robbery or an extortion does not by itself render the statute unconstitutional. As the United States Supreme Court has recognized, "when an act violates more than one criminal statute, the

Government may prosecute under either so long as it does not discriminate against any class of defendants." (*United States v. Batchelder* (1979) 442 U.S. 114, 123-124.) Here, prosecutorial discretion has already been limited, because the crimes of extortion and robbery, though related, have different elements. For the same reasons, because the elements of the two offenses are not the same, the language of the extortion statute does not delegate policymaking to prosecutors. Defendants have also not shown there is arbitrary or otherwise discriminatory application of the statutes.

In sum, we find no merit in defendants' claim that the extortion statute (former § 518) is unconstitutionally vague.

3. *Failure to Instruct the Jury on the Definition of Consent*

Next, defendants argue the court erred when it failed to sua sponte instruct the jury on the meaning of the term "consent." Defendants insist that the term "consent" was a general principle of law that the court was required to give an instruction on, and its failure to do so was prejudicial. We reject defendants' argument. As we previously described, the term "consent" as used in former section 518 does not have a technical meaning different from its common meaning. Thus, further instruction on its definition was unnecessary.

" '[T]he language of a statute defining a crime or defense is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification. If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language.' " (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) The trial court, however, has a sua sponte duty to instruct if a term used in an instruction has "a technical meaning that is peculiar to the law." (*People v. Howard* (1988) 44 Cal.3d 375, 408.) "The rule to be applied in determining whether the meaning of a statute is adequately conveyed by its express terms is well established. When a word or phrase ' "is

commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request." ' [Citations.] A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning." (*People v. Estrada, supra,* at p. 574.)

As we stated in the previous section of our opinion, "consent" as used in former section 518 does not have a technical, legal meaning. "Consent" is a word with a commonly understood definition, and that definition is the one we believe should be employed in the extortion statute. As we explained in the preceding section of our opinion, the statement in *Peck* that a victim of extortion must hand property over with "apparent willingness" does not make it some specialized term. (*Peck, supra,* 43 Cal.App. at p. 645.) The statement in *Peck* merely clarified what is necessary when consent is induced by force or fear, as required under former section 518, that is, there must still be apparent willingness by the victim. By itself, the term "consent" retains its ordinary, common meaning.

For these reasons, the court did not err when it did not sua sponte instruct the jury on the definition of "consent."[14]

4. *Sufficient Evidence of Kidnapping to Commit Robbery*[15]

Defendants moved Wise several times during the commission of the crime. Wise testified he was beaten as he entered his home, lifted, and carried into his kitchen where he was tied to a chair, and then moved from the kitchen to the room where he kept his safes. Defendants argue these movements were merely incidental to the commission of

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[14] Based on our conclusion, we need not address defendants' claim of prejudice.

[15] The standard of review applicable here is the same as the standard we employed when examining defendants' claim that there was insufficient evidence to support their convictions for kidnapping to commit extortion.

the robbery, and Wise was not subjected to an increased risk of physical or psychological harm from being moved. Thus, defendants argue there was insufficient evidence to convict them of the crime of kidnapping to commit robbery (§ 209, subd. (b)(1)). As we explain below, we find no merit in defendants' claims.

Section 209, subdivision (b)(1) provides in pertinent part: "Any person who kidnaps or carries away any individual to commit robbery . . . shall be punished by imprisonment in the state prison for life with the possibility of parole." Kidnapping for robbery has an asportation element. The asportation element for kidnapping for robbery requires "movement of the victim [that] is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." (§ 209, subd. (b)(2).)

These additional requirements were derived from the California Supreme Court's decision in *People v. Daniels* (1969) 71 Cal.2d 1119. In *Daniels*, two defendants committed several rapes. During each of the crimes, the defendants moved the victims a short distance within the premises where the defendants found them. The California Supreme Court concluded that "some brief movements are necessarily incidental to the crime of armed robbery" and that "such incidental movements are not of the scope intended by the Legislature in prescribing the asportation element of the same crime." (*Id*. at p. 1134.) Applying this rule, the *Daniels* court held that the brief movements the defendants subjected their victims to did not satisfy the asportation element of the crime. (*Id*. at p. 1140.)

Following *Daniels*, courts have analyzed the two components of the asportation element (movement that is not merely incidental to the crime that increases the risk of harm to the victim) and have concluded that they "are not distinct, but interrelated, because a trier of fact cannot consider the significance of the victim's changed

environment without also considering whether that change resulted in an increase in the risk of harm to the victim." (*People v. Martinez* (1999) 20 Cal.4th 225, 236.)

Even small movements may satisfy the asportation element. "[N]o minimum distance is required to satisfy the asportation requirement [citation], so long as the movement is substantial." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152.) "Measured distance . . . is a relevant factor, but one that must be considered in context, including the nature of the crime and its environment. In some cases a shorter distance may suffice in the presence of other factors . . . . For example, moving robbery victims between six and 30 feet within their home or apartment [citation] or 15 feet from the teller area of a bank to its vault [citation] may be viewed as merely incidental to the commission of the robbery and thus insufficient to satisfy the asportation requirement of aggravated kidnapping. Yet, dragging a store clerk nine feet from the front counter of a store to a small back room for the purpose of raping her [citation] or forcibly moving a robbery victim 40 feet within a parking lot into a car [citation] might, under the circumstances, substantially increase the risk of harm to the victim and thus satisfy the asportation requirement." (*Ibid*.)

Here, both defendants assert that they moved Wise to facilitate the robbery, and the movements did not satisfy the asportation element of kidnapping. To support their position, they rely on *People v. Hoard* (2002) 103 Cal.App.4th 599. In *Hoard*, the appellate court concluded the defendant's forcible movement of jewelry store employees approximately 50 feet to the office at the back of the store was insufficient to support a kidnapping. (*Id*. at p. 607.) The appellate court concluded that confining the two employees to the back office gave the defendant the freedom to access the jewelry and allowed him to conceal the robbery from entering customers. Thus, the movement was merely incidental to the robbery. (*Ibid*.) The movement also did not substantially increase the risk of harm to the women, because restraining the victims in the backroom

reduced their risk of harm compared to holding them at gunpoint at the front of the store. (*Ibid*.)

Defendants also rely on *People v. Williams* (2017) 7 Cal.App.5th 644. There, the robbers, who committed a series of robberies of electronic stores, "entered the stores through the front doors and moved the employee victims to areas closer to the merchandise they planned to take." (*Id*. at p. 669.) The defendants challenged their convictions for aggravated kidnapping. The People argued there was sufficient evidence of kidnapping, noting that the backs of the stores were " 'shielded from view' " and the movement of the victims from the more public front area of the stores increased their risk of harm. (*Ibid*.) Citing *Hoard*, the appellate court concluded that the victims' movements were incidental to the robberies and the record did not contain sufficient evidence that moving the victims to the back of the stores resulted in an increased risk of harm. (*Id*. at pp. 669-670.) The court reversed the defendants' convictions for aggravated kidnapping. (*Id*. at p. 670.)

With respect to whether defendants' movements of Wise were merely incidental to the crime, we find the facts present a close case. We agree with defendants that the facts of their case resemble the scenarios presented in *Hoard* and *Williams* and that some of the men's movements of Wise—such as moving Wise from the kitchen area to the room with the two safes—can be viewed as facilitating the robbery. However, even movements of victims that are *necessary* to a robbery are not always *incidental*. (*People v. James* (2007) 148 Cal.App.4th 446, 454-455.) "Lack of necessity is a sufficient basis to conclude a movement is not merely incidental; necessity alone proves nothing." (*Id*. at p. 455.) A reasonable jury could conclude that several of the movements were unnecessary, such as the movement of Wise from the front door to the kitchen where he was tied up. In fact, a jury could conclude moving Wise inside the house *at all* was unnecessary. The men could have asked Wise for the combinations when they assaulted

him near his front door. And there was evidence the men did not need to tie Wise to the chair in the kitchen to subdue him. Yet, defendants proceeded to restrain him.

Furthermore, whether a movement was incidental and whether it increased a victim's risk of harm are not mutually exclusive elements; they are interrelated. (*People v. Rayford* (1994) 9 Cal.4th 1, 12.) In *Hoard* and *Williams*, there was insufficient evidence that the movements of the victims increased their risk of harm. Here, there was evidence presented at trial that moving Wise from outside the house to inside the house was not merely trivial in nature, and in fact *did* increase his risk of harm. By moving Wise further inside of his house, the men were able to gain even greater control over him. Although Wise lived in a secluded area, the jury could reasonably infer that moving him from the outside of his house, where he had just parked his truck, into the interior of the house decreased his risk of escape and further reduced the likelihood that a neighbor or passerby would detect a crime. (*People v. Dominguez, supra,* 39 Cal.4th at pp. 1153-1154 [movement of rape victim from side of road to spot in orchard approximately 25 feet away reduced possibility of detection, escape, or rescue, and was not merely incidental to rape].)

Significantly, there was evidence that Wise lived close enough to his neighbors that they could have potentially heard cries of distress if he had remained outside or near the threshold of his house. During trial, Wise testified that he could hear his neighbors working on cars and motorcycles and could also hear raised voices and children playing in his neighbor's backyard if he was outside. One of his neighbors, Rose Dias, testified that she could sometimes hear Wise outside yelling and cussing when she was at her house.

In sum, we find substantial evidence supports defendants' convictions for kidnapping to commit robbery.

5. *Defendants' Convictions for Grand Theft and Vehicle Theft*

Defendants argue that their convictions for grand theft and vehicle theft must be reversed, because the theft of Wise's firearms (supporting their grand theft convictions) and the theft of his truck (supporting their vehicle theft convictions) occurred during the robbery. Thus, they argue that because they were already convicted of robbery, they could not have been convicted of either additional theft charge.

We first address defendants' convictions for grand theft under section 484 and section 487, subdivision (c). The People agree that defendants' convictions for grand theft should be reversed, and we find their concession appropriate. Here, defendants were charged and convicted for both robbery *and* grand theft for taking the guns from Wise's safes. Multiple convictions cannot be based on necessarily included offenses. (*People v. Ortega* (1998) 19 Cal.4th 686, 692 (*Ortega*).) Since grand theft is a lesser included offense of robbery, defendants could not be convicted of both based on the same conduct. (*Id*. at pp. 693-694.) Defendants' convictions for grand theft must therefore be reversed.

Next, we address defendants' convictions for vehicle theft under Vehicle Code section 10851, subdivision (a). Defendants argue that like their convictions for grand theft, their convictions for vehicle theft were part of the same course of conduct that included the robbery and should therefore be reversed. We disagree.

An accusatory pleading may charge different statements of the same offense and the defendant can be convicted of any of the offenses charged. (§ 954.) As we have stated, the exception is that one cannot have multiple convictions based on lesser included offenses. (*Ortega*, *supra*, 19 Cal.4th at p. 692.) "[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing

the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117.) "The fact one indivisible act or indivisible course of conduct simultaneously violates two statutes does not require a conclusion of the offenses is a necessarily lesser included offense to the other, making the defendant subject to conviction for only one of the offenses." (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 418.)

Here, the offense of vehicle theft (Veh. Code, § 10851) is not a lesser included offense of robbery (§ 211). (*People v. Dominguez, supra*, 38 Cal.App.4th at p. 419 ["it is well settled the offense proscribed in Vehicle Code section 10851 is not a lesser included offense to robbery"].) To commit robbery, one must have the intent to "*permanently deprive* the victim of possession of the property." (*Id*. at p. 418.) A violation of Vehicle Code section 10851 requires proof that one drives or takes a vehicle belonging to another owner, without the owner's consent, and with the specific intent to permanently or temporarily deprive the owner of title or possession. Thus, the statutory elements of the greater offense—robbery—do not include all the elements of the lesser offense of vehicle theft.

Moreover, the *facts* alleged in the accusatory pleading do not demonstrate that the vehicle theft charged here is a lesser included offense to the robbery. In count 6, defendants were charged with robbery of Wise's *firearms*. In count 9, defendants were charged with theft of Wise's *truck*. As alleged, defendants could have committed the robbery offense without also committing the vehicle theft. Accordingly, defendants' convictions for vehicle theft were not erroneous.

6. *Defendants' Multiple Punishment for Vehicle Theft, Burglary, and Arson*

Next, defendants challenge the trial court's imposition of sentences for their convictions of vehicle theft of Wise's truck, burglary of Wise's home, and arson of Wise's truck. Defendants argue that the sentences for these convictions should have been stayed under section 654.

a. **Overview and Standard of Review**

Section 654, subdivision (a) provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of punishment, but in no case shall the act or omission be punished under more than one . . . ." In other words, "[s]ection 654 precludes multiple punishments for a single act or indivisible course of conduct." (*People v. Hester* (2000) 22 Cal.4th 290, 294.)

"It is [a] defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Thus, "if all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." (*Ibid.*) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' " (*Ibid.*) "We apply the substantial evidence standard of review to the trial court's implied finding that a defendant harbored a separate intent and objective for each offense." (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1414.)

b. **Theft of Wise's Truck**

Defendants argue their sentences for vehicle theft should have been stayed, because the theft of Wise's truck was indivisible from their robbery of Wise's firearms. Given the evidence presented at trial, we disagree and conclude there is sufficient evidence to conclude defendants had separate objectives when they robbed Wise of his firearms and drove his truck away from the scene of the crime.

First, defendants had driven their own car to Wise's home. Thus, there was evidence they did not need to use it to facilitate their escape. (*People v. Irvin* (1991) 230 Cal.App.3d 180, 185 [robbery not complete until defendant reaches temporary place of safety]; *People v. Bauer* (1969) 1 Cal.3d 368 [§ 654 precluded multiple punishment for robbery and theft of an automobile when evidence showed robbers formed intent to steal car when ransacking house and carrying stolen property to the garage].) Furthermore, defendants subsequently burned Wise's truck after driving it into the mountains. This supports an inference that defendants had some other intent—such as to prevent Wise from following them, or to cover their tracks—when they took his truck.

We recognize that this is a close issue. The robbery of Wise and the theft of his truck were committed relatively close in time, and the evidence supports a competing inference that Wise's truck was taken merely as an afterthought to the robbery. However, we must view the evidence in the light most favorable to the judgment. (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) Given that there is substantial evidence to support a finding that defendants harbored separate intents when they took Wise's car, our inquiry ends and we must not reweigh the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Thus, we conclude the trial court did not err in declining to stay the punishment for vehicle theft.

c. **Burglary of Wise's Home**

Defendants argue the trial court erred in failing to stay under section 654 the punishments imposed for their respective burglary convictions, because the burglary of Wise's home was indivisible from the subsequent robbery. We disagree. There was sufficient evidence from which the court could have concluded defendants had separate intents and objectives when they broke into Wise's house, committing the burglary, and when they took Wise's firearms, committing the robbery.

"It is settled law that section 654 bars punishment for both burglary and robbery where the sole purpose of the burglary was to effectuate the robbery." (*People v. Smith* (1985) 163 Cal.App.3d 908, 912.) In cases where the robbery and burglary were the means of accomplishing a single intent of theft, courts have held that multiple punishment is barred. (*People v. Le* (2006) 136 Cal.App.4th 925 (*Le*).)

For example, in *People v. Perry* (2007) 154 Cal.App.4th 1521 (*Perry*), the victim returned to his car to find the defendant inside of it. (*Id*. at p. 1523.) The defendant ran, holding the victim's car stereo and a screwdriver or ice pick in his hand. (*Ibid*.) The victim managed to tackle the defendant. (*Ibid*.) The appellate court concluded the defendant's objective in committing the burglary was the theft of the victim's car stereo. (*Id*. at p. 1527.) The robbery, on the other hand, was committed when the victim confronted the defendant. (*Ibid*.) The defendant, however, had the *same* objective when he committed the robbery—the theft of the car stereo. (*Ibid*.)

The *Perry* court noted that the trial court had erred by focusing on when the burglary was completed. The appellate court determined that what must be considered is whether the offenses "were part of an indivisible course of conduct, whether the defendant acted according to a single objective or multiple independent objectives, and whether the defendant committed violent crimes against different victims." (*Perry, supra*, 154 Cal.App.4th at p. 1527.) Since it found no evidence supporting a conclusion that the defendant acted with independent criminal objectives, the appellate court held that section 654 required a stay of the defendant's burglary conviction. (*Perry, supra,* at p. 1527.)

Similarly, in *Le*, *supra*, 136 Cal.App.4th 925, the defendant was convicted of robbery and theft after he and several accomplices entered a store and loaded a shopping cart with bottles of whiskey and packages of diapers. (*Id*. at p. 929.) They left the store without paying and loaded the items in their car. (*Ibid*.) The store's manager, who had

seen the defendant and his accomplices take the fully loaded shopping cart out of the store, used the store's paging system to alert others of the shoplifting, and ran outside to confront the men. (*Ibid*.) Several other employees managed to reach the defendant's car first, where they struggled over the car key with the defendant. (*Ibid*.) The defendant, who was driving, pulled the car forward with one employee still inside. The employee was dragged a short distance but was able to free himself. (*Ibid*.)

On appeal, the defendant in *Le* argued the trial court should have stayed his sentence for burglary under section 654. (*Le*, *supra*, 136 Cal.App.4th at p. 931.) The People conceded, and this court found their concession appropriate. (*Ibid*.) This court concluded the record reflected that the robbery and burglary were committed to accomplish the single intent to steal bottles of whiskey and packages of diapers from the store, and the robbery arose when the defendant ultimately used force to steal the items. (*Ibid*.)

In contrast, appellate courts have held that burglary and robbery convictions can be subject to multiple punishment when there is sufficient evidence the offenses were not an indivisible course of conduct. In *People v. Green* (1985) 166 Cal.App.3d 514, the court determined there was sufficient evidence to support the trial court's conclusion that the burglary and robbery were not indivisible. (*Id*. at p. 518.) There, the defendants were not aware that the victim was home when they entered, unexpectedly came across the victim, then raped her and stole her rings. (*Ibid*.)

Similarly, in *People v. Dugas* (1966) 242 Cal.App.2d 244, disapproved of on a different point as stated in *Prudhomme v. Superior Court* (1970) 2 Cal.3d 320, 327, footnote 11, the defendant entered the victim's apartment when the victim was not home. While the defendant was still inside, the victim returned home, at which point the defendant robbed the victim. (*People v. Dugas*, *supra*, at pp. 250-251.) The *Dugas* court concluded that the burglary, consisting of breaking and entering into the victim's house

with the intent to steal, had already been completed by the time the victim returned home, and the defendant later formed the intent to commit a robbery as opposed to theft after the victim returned. (*Ibid*.) Thus, there was sufficient evidence that the two crimes were not part of an indivisible transaction with the same objective, and the defendant's separate punishments for burglary and robbery did not violate section 654.

We believe that the reasoning set forth in *Green* and *Dugas* are more analogous to the facts presented in this case. Here, there was evidence defendants originally intended to break into Wise's home when he was away and steal the items from the safe under the cover of darkness. Isaias, an accomplice to the crime, testified that was the original plan. In other words, there was sufficient evidence that defendants' *intent* when they broke into the house was *not* to commit a robbery. Additionally, there was also evidence that the men formulated the intent to commit a robbery *after* they were unable to open the safes and the safes were too heavy for them to haul. Navarro, Gonzales's half-brother, testified that Gonzales told him they waited for Wise to return home after they determined the two safes were too big to haul. Thus, not only is there evidence of a temporal separation between the two offenses, but there is evidence that defendants formulated two separate intents, rendering the two crimes divisible. Evidence of two separate intents distinguishes this case from both *Perry* and *Le*. In *Perry* and *Le*, the evidence supported a determination that there was only a single objective to commit theft, and the resulting use of force was merely incidental to that objective.

Viewing the evidence in the light most favorable to the judgment, we conclude the trial court did not err when it imposed multiple punishment for defendants' convictions for burglary and robbery.

d. **Arson of Wise's Truck**

Defendants argue the trial court erred when it failed to stay the punishments imposed for their convictions of arson (§ 451, subd. (d)) for burning Wise's truck,

because the evidence indicated they stole Wise's truck with the objective to burn it. Thus, they argue they cannot be punished both for stealing the truck and for burning it. We find this argument has no merit, because there was sufficient evidence for the court to find the theft of the truck and its subsequent arson were committed with separate objectives and intents.

The evidence at trial indicated the defendants took Wise's truck after they opened the safes inside Wise's home. The men also took Wise's cell phone. Thus, there was evidence supporting an inference that defendants took Wise's truck to prevent Wise from following them. Subsequently, they drove the truck to the mountains in Saratoga and burned it. The fact the truck was burned supports an inference that defendants committed the arson to conceal evidence. Thus, substantial evidence supports the trial court's decision to impose multiple punishment for defendants' convictions for arson and vehicle theft.

e. **Receiving Stolen Property (Huang's Firearms)**

Lastly, Gonzales argues the trial court erred when it imposed multiple punishment for his convictions of first degree burglary of Huang's home and for concealing or withholding the guns taken from Huang's home (counts 11 and 12). The People concede imposition of sentences for both counts violated section 654, and we find their concession appropriate. Here, the offense of receiving stolen property, Huang's firearms, was based on the same theft of property underlying Gonzales's conviction for burglary of Huang's home. Thus, the offenses were committed with a single intent and objective, and punishment for the lesser offense, concealing or withholding stolen property, must be stayed under section 654. (*People v. Allen* (1999) 21 Cal.4th 846, 864-865; *People v. Landis* (1996) 51 Cal.App.4th 1247, 1253-1254.)

7. *Penalty Assessments*

When defendants were sentenced, the trial court orally imposed a $10 fine under section 1202.5 plus an additional $31 of penalty assessments.[16] The minute orders from defendants' respective sentencing hearings, on the other hand, reflect the imposition of a $10 fine plus $30 of penalty assessments. Defendants' abstracts of judgment reflect the imposition of a $10 fine under section 1202.5 and $31 of penalty assessments. Defendants argue the amount of the penalty assessments imposed by the trial court (whether it be $30 or $31) is incorrect, and they should actually be subject to $28.50 of penalty assessments. The People concede. Assuming the court imposed $31 of penalty assessments for both defendants, we agree with the parties that the court erroneously calculated their penalty assessments and that the judgment should be modified to reflect the correct amount of penalty assessments and the statutory basis for the amount. However, we disagree with the parties that the penalty assessments should be reduced to $28.50. As explained below, we believe defendants' penalty assessments should be reduced to $30.

There are seven assessments, surcharges, and penalties that attach to an underlying fine that could increase the fine. (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1374 (*Voit*).) In *Voit*, we explained that a fine imposed under section 1202.5 is subject to seven penalty assessments under the following statutes (with the current percentages listed below): (1) a 100 percent state penalty assessment (§ 1464, subd. (a)(1)), (2) a 20 percent state surcharge (§ 1465.7), (3) a 50 percent state courthouse construction penalty (Gov. Code, § 70372), (4) a 70 percent additional penalty (Gov. Code, § 76000,

[16] We note that the reporter's transcript from Gonzales's sentencing hearing indicates the court imposed the $10 fine plus $31 penalty assessment under section "2027.5." Given that the Penal Code does *not* have a section 2027.5 and the abstract of judgment reflects imposition of a fine under section 1202.5, we believe this is a transcription error.

subd. (a)(1)), (5) a 20 percent additional penalty if authorized by the county board of supervisors for emergency medical services (Gov. Code, § 76000.5, subd. (a)(1)), (6) a 10 percent additional penalty " ' "[f]or the purpose of implementing the DNA Fingerprint, Unsolved Crime and Innocence Protection Act" ' " (Gov. Code, § 76104.6, subd. (a)(1)), and (7) a 40 percent additional state-only penalty to finance Department of Justice forensic laboratories (Gov. Code, § 76104.7). (*Voit*, *supra*, at pp. 1373-1374.) In total, criminal defendants may *presently* be subject to a 310 percent penalty assessment on their base $10 fine.

First, defendants argue the 40 percent penalty imposed under Government Code section 76104.7 should be reduced to a 30 percent penalty. We agree. "[W]e apply the statutes [citations] in effect at the time of defendant[s'] crimes in order to avoid an ex post facto expansion of defendant[s'] punishment by later statutory amendments." (*Voit*, *supra*, 200 Cal.App.4th at p. 1375.) At the time defendants committed the robbery, Government Code section 76104.7 provided for a 30 percent penalty. (Stats. 2009-2010, ch. 3, § 1, eff. Jun. 10, 2010.)

Next, defendants argue the 50 percent penalty imposed under Government Code section 70372, subdivision (a) must be reduced to 35 percent. (*Voit*, *supra*, 200 Cal.App.4th at p. 1375; Gov. Code, § 76000, subd. (e).) We disagree.

At the time defendants committed their offenses, Government Code section 70372 provided the courthouse construction penalty could be reduced as provided by Government Code section 70375, subdivision (b). (Stats. 2010, ch. 720, § 16, eff. Oct. 19, 2010; former Gov. Code, § 70372, subd. (b).) The current version of Government Code section 70375 was in effect at the time defendants committed their offense and does not specify the courthouse construction fee is subject to any reduction.

Defendants cite to *Voit*, *supra*, 200 Cal.App.4th at page 1375 for the proposition that the courthouse construction penalty under Government Code section 70372 should

be reduced to 35 percent. *Voit*, however, examined the statutes that were in effect at the time the *Voit* defendant committed his offenses in 2003. (*Voit, supra,* at p. 1375.) For a period of time, Government Code section 70375, subdivision (b) permitted two potential reductions to the 50 percent courthouse construction fund. (*Voit, supra,* at p. 1375; *People v. McCoy* (2007) 156 Cal.App.4th 1246.) By the time defendants committed their offenses in February 2011, the Legislature had eliminated these two reductions to the courthouse construction penalty, and Government Code section 70375 has no mention of a reduction to the courthouse construction penalty. Thus, a 50 percent courthouse construction penalty was appropriately imposed on both defendants' fine.

Accordingly, defendants' $10 fine under section 1202.5 is subject to a 300 percent penalty assessment, taking into account the fact that Government Code section 76104.7 provided for a 30 percent, not 40 percent, penalty at the time defendants committed their offenses. The imposition of $31 of penalty assessments was therefore erroneous, because defendants' fines were subject to $30 of penalty assessments.

Lastly, we note the trial court did not specify the statutory basis for the penalty assessments that were imposed. "Although . . . a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts. All fines and fees must be set forth in the abstract of judgment." (*People v. High* (2004) 119 Cal.App.4th 1192, 1200.) "[I]n cases where the amounts and statutory bases for the penalty assessments have been set forth in a probation report, a sentencing memorandum, or some other writing, the court could state the amount and statutory basis for the base fine and make a shorthand reference in its oral pronouncement to 'penalty assessments as set forth in the' probation report, memorandum, or writing . . . ." (*People v. Hamed* (2013) 221 Cal.App.4th 928, 939-940.) Here, there is no probation report or other writing specifying the statutory basis for the penalty assessment. Thus, we must direct

the court clerk to file an amended abstract of judgment that lists the amount and statutory basis for each of the penalty assessments.

8. *Firearm Enhancements*

Both defendants were sentenced to an additional 10-year enhancement for personal use of a firearm during the course of Wise's robbery under section 12022.53, subdivision (b). Defendants argue that remand is now necessary so the trial court may exercise its discretion to strike or dismiss their firearm enhancements imposed under section 12022.53, subdivision (h).[17] We agree.

While defendants' appeal was pending, the Legislature enacted Senate Bill No. 620. Senate Bill No. 620 amended section 12022.53, subdivision (h), which now reads: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." Senate Bill No. 620 took effect on January 1, 2018. Prior to its passage, trial courts did not have the discretion to strike or dismiss firearm enhancements imposed under section 12022.53. (Former § 12022.53, subd. (h).) Defendants argue that because their case was not yet final as of January 1, 2018, the amendment applies retroactively under the rule articulated in *In re Estrada* (1965) 63 Cal.2d 740.

We agree that *Estrada* applies. Whether a statute is prospective or retroactive is a matter of legislative intent. (*People v. Brown* (2012) 54 Cal.4th 314, 319.) The "default rule" is that absent an express retroactivity provision, " 'a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.' " (*Ibid*.; § 3.) In *Estrada*, the court created a

[17] Fonseca raised this argument in a supplemental opening brief, and Gonzales later joined in Fonseca's argument.

"contextually specific qualification to the ordinary presumption that statutes operate prospectively: When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*People v. Brown, supra,* at p. 323, fn. omitted; *In re Estrada, supra,* 63 Cal.2d at pp. 742-748.) However "[t]he rule in *Estrada* . . . is not implicated where the Legislature clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent." (*People v. Nasalga* (1996) 12 Cal.4th 784, 793.) Here, there is nothing in the statutory language that clearly signals the Legislature intended the amendments made by Senate Bill No. 620 to apply prospectively. Thus, the amendment applies to defendants.

However, even though the amendment is retroactive, we must still determine whether a remand is necessary or if it would be an " 'idle act.' " (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901.) Generally, "when the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) The rationale for this general rule is that "[d]efendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion." (*Ibid*.) There is an exception to this rule, however, where " 'the record shows that the trial court would not have exercised its discretion even if it believed it could do so,' " in which case, " 'remand would be an idle act and is not required.' " (*People v. Gamble, supra,* at p. 901.)

In *People v. McDaniels* (2018) 22 Cal.App.5th 420 (*McDaniels*), the court addressed the appropriate standard to "apply in assessing whether to remand a case for resentencing in light of Senate Bill [No.] 620." (*Id.* at p. 425.) Relying on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, which dealt with reconsidering Three Strikes sentencing in light of *Romero*,[18] the *McDaniels* court determined that a "remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*McDaniels*, *supra*, at p. 425.)

The salient question is whether the trial court "express[ed] its intent to impose the maximum sentence permitted." (*McDaniels*, *supra*, 22 Cal.App.5th at p. 427.) "When such an expression is reflected in the appellate record, a remand would be an idle act because the record contains a clear indication that the court will not exercise its discretion in the defendant's favor." (*Ibid.*)

The People argue the record reflects remanding the matter would be an idle act. The People insist that if the court wanted to ameliorate defendants' sentences, it would have chosen the low term for their sentences instead of the midterm. The court also made comments during defendants' respective sentencing hearings that it would not have granted either of the defendants' probation even if they were eligible. However, as the People acknowledge, the court expressly chose the *middle* term—not the upper term—for convictions where it had the discretion to make such a choice. While the court's sentencing choices and its comments during defendants' hearings gives the appearance that it seems *unlikely* that it will choose to strike defendants' respective firearm enhancements, this still falls short of the standard articulated in *McDaniels*. Based on this record, we do not believe that choosing a midterm sentence for convictions and

[18] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

stating a preference against granting probation (if it had been an available option) is a clear expression that the court intended to impose the *maximum* sentence possible. (*McDaniels, supra,* 22 Cal.App.5th at p. 427.)

Thus, we find remand is necessary so the trial court can exercise its discretion under section 12022.53, subdivision (h).

DISPOSITION

The judgments are reversed and remanded. On remand, the trial court is directed to: (1) strike Fonseca's and Gonzales's convictions and sentences for grand theft (count 8), (2) stay Gonzales's sentence for receiving stolen property (count 12), (3) reduce the penalty assessments imposed on Fonseca's and Gonzales's $10 fine (Pen. Code, § 1202.5) from $31 to $30, and (4) consider whether to exercise its discretion to strike Fonseca's or Gonzales's firearm enhancement (Pen. Code, § 12022.53). The trial court clerk is further directed to amend the abstracts of judgment to state the amounts of and the statutory bases of all imposed penalty assessments.

Greenwood, P.J.

WE CONCUR:

Elia, J.

Grover, J.

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